

1. **Shrestha (Migration) [2017] AATA 647 (27 April 2017)**

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DECISION RECORD

DIVISION: Migration & Refugee Division

APPLICANTS: Ms Ratna Shrestha
Mr Sunny Shrestha

CASE NUMBER: 1704046

DIBP REFERENCE(S): BCC2016/3238054

MEMBER: Penelope Hunter

DATE: 27 April 2017

PLACE OF DECISION: Sydney

DECISION: The Tribunal remits the applications for Student (Temporary) (Class TU) visas for reconsideration, with the direction that the first named applicant meets the following criteria for Subclass 500 (Student) visas:

- Public Interest Criterion 4020 for the purposes of cl.500.217 of Schedule 2 to the Regulations.

Statement made on 27 April 2017 at 4:51pm

CATCHWORDS

Migration – Student (Temporary) (Class TU) visa – Subclass 500 Student – cl 500.217 – Public Interest Criterion 4020 – Bogus document – Job offer letter – Questionable conduct by Departmental official overseas – Misunderstanding regarding applicant's course details

LEGISLATION

5. *Migration Act 1958*, ss 5(1), 65
Migration Regulation 1994, Schedule 2 cl 500.217

CASES

Arora v MIBP [2016] FCAFC 35
Batra v MIAC [2013] FCA 274
Trivedi v MIBP [2014] FCAFC 42

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

6. This is an application for review of a decision made by a delegate of the Minister for Immigration on 17 February 2017 to refuse to grant the applicants Student (Temporary) (Class TU) visas under s.65 of the *Migration Act 1958* (the Act).
7. Ms Ratna Shrestha is the applicant, her husband Mr Sunny Shrestha is a secondary applicant.
8. The applicants applied for the visas on 20 September 2016. The delegate refused to grant the visas on the basis that the first named applicant (the applicant) did not satisfy the requirements of cl.500.217 of Schedule 2 to the Migration Regulations 1994 (the Regulations) because the delegate found that the applicant did not meet Public Interest Criterion 4020 (PIC 4020). The Departmental decision, submitted by the applicant to the Tribunal, records that the delegate found that a letter provided by the applicant in relation to a job offer with Sun Brick Industries Pvt. Ltd Nepal, dated 28 November 2016, was a bogus document within the meaning of s.5(1) of the Act.
9. Casenotes on the Department file record that when Department staff in India spoke to Mr Ajay Man Shrestha, chairman of Sun Brick Industries Pvt. Ltd, that he did not have information on the course that the applicant was studying in Australia, or her previous studies and that the employment was not guaranteed and was conditional upon formal interview when the applicant returned to Nepal. The Department had raised with the applicants information obtained from Mr Ajay Man Shrestha and invited them to respond. In response the applicant provided to the Department a further letter from Mr Ajay Man Shrestha, a copy of Certificate of Incorporation of Company, Certificate of Registration, Ministry of Finance Permanent Accounts Number (PAN) Registration Certificate and a letter of submission from their agent.
10. In summary the letter of Mr Ajay Man Shrestha, dated 9 February 2017, provided details of the company Sun Brick Industries Pvt Ltd Nepal, key details of the conversation with the Department officer in Delhi and set out the following (in summary);
 - i. The Department officer who telephoned him spoke in Hindi. He had wanted to answer the questions in English; however he continued to speak to him in Hindi which is not his native language.
 - ii. He did not state that he had no information on what course the applicant was doing in Australia. He did not say that the course was probably Marketing. What he in fact said was that she is doing an MBA course and he was not aware of the subjects of the course.
 - iii. The concerns raised by the Department appear to be based on a misinterpretation of his responses to the Department, the language barrier and incorrect notes taken by the officer.
 - iv. It was correct that the applicant's employment was genuine. It was conditional upon formal interview on her return to Nepal and the job offer letter clearly states that this is the case. Just because he stated that it was not a guaranteed job did not mean that it was invalid or non-genuine. It was conditional upon her providing evidence of successful completion of her course in Australia. Just because he stated that the job offer was conditional and that there would be a formal interview did not mean that the

job offer letter he issued was fraudulent and misleading or bogus or that the position is non-genuine.

11. The agent for the applicants submitted to the Department due to the factors raised in the letter of Mr Ajay Man Shrestha, the competency and accuracy of the report submitted to the Department by their officer in India was questionable.
12. On 11 April 2017, the Tribunal wrote to Mr Ajay Man Shrestha at the email address provided and on 19 April 2017, the Tribunal received a response.
13. The applicant appeared before the Tribunal on 27 April 2017 to give evidence and present arguments. The Tribunal also received oral evidence from Mr Ajay Man Shrestha. The Tribunal hearing was conducted with the assistance of an interpreter in the Nepali and English languages.
14. The applicants were represented in relation to the review by their registered migration agent, however their agent did not attend the hearing.
15. For the following reasons, the Tribunal has concluded that the matter should be remitted for reconsideration.

CONSIDERATION OF CLAIMS AND EVIDENCE

16. The issue in this review is whether the visa applicant meets Public Interest Criterion 4020 (PIC 4020) as required by cl.500.217 for the grant of the visa. Broadly speaking, this requires that:
 - there is no evidence that the applicant has given, or caused to be given, to the Minister, an officer, the Tribunal, a relevant assessing authority, or Medical officer of the Commonwealth, a bogus document or information that is false or misleading in a material particular in relation to the application for the visa or a visa that the applicant held in the 12 months before the application was made: cl.4020(1); and
 - the applicant and each member of the family unit has not been refused a visa because of a failure to satisfy cl.4020(1) during the period starting 3 years before the application was made and ending when the visa is granted or refused, unless the applicant was under 18 at the time the application for the refused visa was made: cl.4020(2) and (2AA); and
 - the applicant satisfies the Minister as to his or her identity: cl.4020(2A); and
 - neither the applicant nor any family unit member has been refused a visa because of a failure to satisfy cl.4020(2A) during the period starting 10 years before the application was made and ending when the visa is granted or refused, unless the applicant was under 18 at the time the application for the refused visa was made: cl.4020(2B) and (2BA).
17. The requirements in cl.4020(1) and (2) can be waived if there are certain compelling or compassionate reasons justifying the granting of the visa: cl.4020(4). However, this waiver does not apply to the identity requirements in cl.4020(2A) and (2B). PIC 4020 is extracted in the attachment to this decision.

HAS THE APPLICANT GIVEN, OR CAUSED TO BE GIVEN A BOGUS DOCUMENT, OR INFORMATION THAT IS FALSE OR MISLEADING IN MATERIAL PARTICULAR?

18. The term 'information that is false or misleading in a material particular' is defined in cl.4020(5) and the term 'bogus document' is defined in s.5(1) of the Act (see the attachment to this decision). In contrast to the definition of 'information that is false or misleading in a material particular' in cl.4020(5), the reference in the definition of bogus document to a document that was obtained because of a 'false or misleading' statement has no requirement that it be relevant to a criterion for the grant of the visa: *Arora v MIBP* [2016] FCAFC 35; *Batra v MIAC* [2013] FCA 274.
19. The requirement in cl.4020(1) not to provide a bogus document, or false or misleading information, applies whether or not the Minister became aware of the bogus document or information that is false or misleading in a material particular because of information given by the applicant: cl.4020(3). It also applies whether or not the document or information was provided by the applicant knowingly or unwittingly.
20. While PIC 4020 refers to information that is false, in the sense of purposely untrue, it is not necessary for the Minister (or the Tribunal on review) to conclude that the applicant was aware the information was purposely untrue in order for PIC 4020 to be engaged. However, an element of fraud or deception by some person is necessary to attract the operation of the provision: *Trivedi v MIBP* [2014] FCAFC 42.
21. Correspondence from the Tribunal to Mr Ajay Man Shrestha dated 11 April 2017 attached copies of the letters dated 28 November 2016 and 9 February 2017. Mr Shrestha was asked to confirm whether he was the author of the documents, whether they were issued in respect of the applicant, whether the documents were genuine and in the same form as originally issued by him and whether the information contained within was true to the best of his knowledge and belief.
22. In the response received from Mr Ajay Man Shrestha dated 19 April 2017, he confirmed that he would be able to discuss the application with the Tribunal at the hearing and he wrote to confirm the following;
 23. (a) *Yes, the documents were issued by me in respect of Ratna Shrestha.*
 24. (b) *I confirm that they are genuine and are in the same form as they were when originally issued by me and have not been altered; and*
 25. (c) *The information contained within is true and correct to the best of my knowledge.*
26. At the hearing the applicant discussed how she first came to have contact with Mr Shrestha, and advised that she had been referred by a former teacher Mr Surya Rana. The applicant discussed how she received the job offer after a phone conversation with Mr Shrestha. She also discussed the circumstances which led to the creation of the letter of 28 November 2016. The applicant denied that it had been created for the benefit of the Department or her visa application. The applicant submitted that job offer was genuine, although it was conditional. The applicant refuted the assertions of the Department that it was a bogus document.
27. Mr Shrestha confirmed to the Tribunal the contents of his email to the Tribunal of 19 April 2017 and his letter dated 28 November 2017 and 9 February 2017. He confirmed that he was the author of all letters. He discussed with the Tribunal the company and confirmed that he had the authority to issue the letter on behalf of Sun Brick Industries Pvt Ltd. In his evidence he corroborated the submissions of the applicant as to how he became aware that

she was looking for employment in Nepal. He told the Tribunal that overseas graduates were in demand in Nepal. He was short of staff with management and business qualifications. He was aware of what the applicant was studying, particularly that she was studying and MBA and once he discussed with the applicant her qualifications he considered that they were relevant for his company and offered her the job. Mr Shrestha further confirmed that he had difficulties communicating with the Department officer who spoke in Hindi. He claimed that at the time of the conversation there he was on the factory floor and there was also a lot of background noise. The officer spoke very quickly and he only speaks a little Hindi. He told the Tribunal that his letters were not bogus and that the job offer was genuine, subject to the applicant obtaining the relevant qualifications. Mr Shrestha confirmed for the Tribunal what he understood of the applicant's existing qualifications; that she had completed a Bachelor of Business and an Advanced Diploma of Business Management as well as the MBA she was currently studying. In reference to the Department officer's claim that he had said that the applicant was studying marketing, he claimed that he had said that the applicant would start in a marketing position and then hopefully move up to the role of general manager.

28. After considering the evidence before it, including the letters of Mr Ajay Man Shrestha dated 28 November 2016, 9 February 2017 and 19 April 2017 and the oral evidence of Mr Ajay Man Shrestha and the applicant to the Tribunal, together with the Department casenotes, the Tribunal finds that the applicant has not submitted a bogus document. The Tribunal accepts the evidence of Mr Ajay Man Shrestha that there was difficulty communicating with the Department representative in Hindi. The Tribunal accepts that his responses may have been misinterpreted due to the circumstances of the call and that the report may not be an accurate reflection of their conversation or the questions that Mr Ajay Man Shrestha understood he was being asked. The Tribunal accepts on the basis of the evidence of Mr Ajay Man Shrestha and the applicant that the letter of offer is genuine. The Tribunal notes from the information contained within the Department file that it is not disputed that the company Sun Brick Industries Pvt Ltd is a genuine company. It is accepted that the offer is conditional upon the applicant satisfying certain criteria such as the completion of her Masters of Business Administration, however this is also stated in the letter of 28 November 2016. The Tribunal finds there was no information that was false or misleading, and in addition, there was no fraud on behalf of anyone involved in obtaining or supplying letter.
29. Therefore, the applicant meets cl.4020(1).

HAS A VISA PREVIOUSLY BEEN REFUSED ON THE BASIS OF A FAILURE TO SATISFY CL.4020(1)?

30. Clause 4020(2) requires the Tribunal to be satisfied that the applicant and each member of the family unit have not been refused a visa because of a failure to satisfy cl.4020(1) in the period commencing 3 years before the application was made and ending when the visa is granted or refused. This requirement does not apply to a person who was under 18 at the time the application for the refused visa was made: cl.4020(2AA).
31. There is no evidence before the Tribunal that the applicant, the secondary applicant or any member of the family unit (as defined in r.1.12) have been refused a visa in the relevant period because of a failure to satisfy cl.4020(1).
32. Therefore, cl.4020(2) is met.

HAS THE APPLICANT SATISFIED THE IDENTITY REQUIREMENTS?

33. Clause 4020(2A) requires an applicant satisfy the Tribunal as to his or her identity. There is no evidence before the Tribunal to suggest that there has been any information given by the applicant to raise concerns regarding her identity or that of the secondary applicant. Therefore the Tribunal is satisfied as to the identity of the applicants.
34. Therefore, the applicant meets cl.4020(2A).
35. On the basis of the above, the applicant does satisfy PIC 4020 for the purposes of cl.500.217.

DECISION

36. The Tribunal remits the applications for Student (Temporary) (Class TU) visas for reconsideration, with the direction that the first named applicant meets the following criteria for Subclass 500 (Student) visas:
 - Public Interest Criterion 4020 for the purposes of cl.500.217 of Schedule 2 to the Regulations.

Penelope Hunter
Member

ATTACHMENT

MIGRATION REGULATIONS 1994

SCHEDULE 4

- 4020 (1) There is no evidence before the Minister that the applicant has given, or caused to be given, to the Minister, an officer, the Tribunal during the review of a Part 5 reviewable decision, a relevant assessing authority or a Medical Officer of the Commonwealth, a bogus document or information that is false or misleading in a material particular in relation to:
- (a) the application for the visa; or
 - (b) a visa that the applicant held in the period of 12 months before the application was made.
- (2) The Minister is satisfied that during the period:
- (a) starting 3 years before the application was made; and
 - (b) ending when the Minister makes a decision to grant or refuse to grant the visa; the applicant and each member of the family unit of the applicant has not been refused a visa because of a failure to satisfy the criteria in subclause (1).
- (2AA) However, subclause (2) does not apply to the applicant if, at the time the application for the refused visa was made, the applicant was under 18.
- (2A) The applicant satisfies the Minister as to the applicant's identity.
- (2B) The Minister is satisfied that during the period:
- (a) starting 10 years before the application was made; and
 - (b) ending when the Minister makes a decision to grant or refuse to grant the visa; neither the applicant, nor any member of the family unit of the applicant, has been refused a visa because of a failure to satisfy the criteria in subclause (2A).
- (2BA) However, subclause (2B) does not apply to the applicant if, at the time the application for the refused visa was made, the applicant was under 18.
- (3) To avoid doubt, subclauses (1) and (2) apply whether or not the Minister became aware of the bogus document or information that is false or misleading in a material particular because of information given by the applicant.
- (4) The Minister may waive the requirements of any or all of paragraphs (1)(a) or (b) and subclause (2) if satisfied that:
- (a) compelling circumstances that affect the interests of Australia; or
 - (b) compassionate or compelling circumstances that affect the interests of an Australian citizen, an Australian permanent resident or an eligible New Zealand citizen;
- justify the granting of the visa.
- (5) In this clause:
- information that is ***false or misleading in a material particular*** means information that is:
- (a) false or misleading at the time it is given; and
 - (b) relevant to any of the criteria the Minister may consider when making a decision on an application, whether or not the decision is made because of that information.

...

MIGRATION ACT 1958

S.5 INTERPRETATION

(1) In this Act, unless contrary intention appears:

...

bogus document, in relation to a person, means a document that the Minister reasonably suspects is a document that:

- (a) purports to have been, but was not, issued in respect of the person; or
- (b) is counterfeit or has been altered by a person who does not have authority to do so; or
- (c) was obtained because of a false or misleading statement, whether or not made knowingly.

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